accounts of the origins of his injuries. But it also shows, as House has already pointed out, that the truth about these events is exculpatory: the bruises were unrelated to the crime, regardless of their origin, and Mr. House's absence from Donna Turner's trailer was inconsistent with House's being the low-voiced person who called Ms. Muncey from her home.

Because the most incriminating pieces of the evidence just discussed were featured prominently in the decisions of the Sixth Circuit majority and of the district court below, we have thought it necessary here to put them into context for this Court's review. Whatever can be said about them or inferred from them in support of the prosecution's case against Mr. House, we think it self-evident that no reasonable juror would conceivably have voted to convict Mr. House of murder on the basis of this evidence alone. That is why the prosecution went to great pains at trial to construct a case for guilt that centered upon apparently incontrovertible forensic-scientific evidence – a case in which semen and blood and their analyses were the critical ingredients, not only of the prosecution's proof of Mr. House's identity as a murderer, but also of the sexual motivation that provided the prosecution's sole theory of why he murdered Ms. Muncey and how the whole sequence of events leading to her death that night unfolded.

### B. On the whole record, the prosecution's critical scientific evidence has now been shown to have little or no incriminating force.

The State's disregard of the full record is most glaring when it comes to facts that demonstrate the unreliability or outright falsity of the scientific evidence which the prosecution presented at trial. Here is what the record shows on that score:

### 1. DNA evidence refutes the prosecution's theory of the case.

At trial, the prosecution elicited expert testimony that semen stains were found on Ms. Muncey's underwear and robe and were consistent with Mr. House's blood type and secretor status. The prosecutors asked the jury to infer from this damning evidence that House attempted to rape Ms. Muncey, she resisted, and he killed her. This was the only reason ever suggested why Mr. House might have assaulted Ms. Muncey. It was made to look persuasive because defense counsel presented no expert rebuttal and could do no more than suggest that that the stains may have been from Hubert Muncey's semen.

DNA testing has now conclusively excluded House and identified Muncey as the source of the semen. Forced to admit this, the State attempts to write a revisionist history of the trial in which the prosecution's entire theory of the case is jettisoned *ex post* and this Court is hoodwinked with statements like "[t]he State never contended at trial that House raped the victim or even that the semen found on Mrs. Muncey's nightgown could only have come from the petitioner." Resp. Br. at 29. While such assertions are carefully crafted to avoid literal inaccuracy, their false implications are manifest as soon as one asks *what else was the prosecution's elaborate expert testimony about the semen stains on Ms. Muncey's garments*[6] *intended to prove,* ***if not*** *that Mr. House* ***attempted*** *to rape her, that the attempted rape was his* ***motive*** *for an otherwise inexplicable assault on Ms. Muncey, and that the attempt left her clothing marked with semen that* ***was consistent with Mr. House's emissions***? What else than this line of proof was the prosecution seeking to bolster when it took the steps it did to deny Mr. House's defense counsel access to available means of disputing that the semen stains on Ms.

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[6] *See, e.g.*, the testimony of FBI expert Paul Bigbee, set out in the dissenting opinion of Judge Merritt below. JA 441-43.

Muncey's clothing were left there by Paul Gregory House?[7] To what else than this line of proof was the prosecution referring when it argued in closing to the jury that Mr. House's evident motive for the killing was "that he was subjecting the lady to some kind of indignity . . . and . . . kill[ed] her because of her resistance"?[8] And by what other logic was the prosecution proceeding when it sought a death sentence for Mr. House on the theory that he killed Ms. Muncey in an attempt to rape her[9] and when it argued to the jury that Mr. House was a previously convicted sex offender who had shown by this rape attempt that he was incapable of rehabilitation?[10] In stark contrast to the State's present cavalier dismissal of the importance of the semen evidence, the trial prosecutors knew very well that their case for guilt and death depended crucially on linking the semen evidence to Mr. House – a link we now know was falsely forged.

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[7] Mr. House's prosecutors knew that Hubert Muncey, Jr., had told investigators that he and his wife had had sexual relations on the last morning of her life. If Muncey was truthful, these relations could refute the notion that the semen stains on Ms. Muncey's clothing were evidence of an attempted rape by her murderer. So the prosecutors took two steps to make sure the jury never heard about this innocent explanation of the stains. First, they did not disclose Hubert Muncey's statement to defense counsel. JA 264-66. Second, they did not send the FBI lab information that would have allowed a determination of Hubert Muncey's secretor status. R4, Vol. VI, p. 928. These tactics left the defense without proof to support its argument that the best explanation for the semen stains was recent relations between Ms. Muncey and her husband.

[8] R4, Vol. IX, pp. 1302, 1305.

[9] One of the three statutory aggravating circumstances that State asked the jury to find at the penalty phase was that the murder was committed while the defendant was committing or attempting to commit rape or kidnapping. JA 109.

[10] *See* the passages of the prosecution penalty-phase argument set out in the dissenting opinion of Judge Merritt below. JA 443-44.

**2. The whole record now leaves the prosecution's bloodstain evidence subject to inescapable doubts.**

FBI testing of jeans that House wore on the night of the crime showed several very small bloodstains consistent with Ms. Muncey's blood, a finding confirmed as to one of these stains by DNA testing. The State continues to urge that these findings establish House's identity as Ms. Muncey's killer despite post-trial evidence that the stains most likely came to be on the jeans through transfer from a test tube containing Ms. Muncey's autopsy blood. To disparage the post-trial evidence, the State necessarily regales this Court with an attack upon the credibility of its own Assistant Chief Medical Examiner, Dr. Cleland Blake, which no prosecutor would risk presenting to a Tennessee jury.

Dr. Blake's post-trial testimony was unequivocal that the bloodstains on Mr. House's jeans had been caused by degraded, "rotted," liquid blood of the kind which was missing from one of the test tubes of autopsy blood that had been packaged with the jeans for transmission to the FBI lab for testing. *See* Pet. Br. at 16-21; *see also* the more detailed discussion in the dissenting opinion of Judge Merritt below. JA 446-55. In response, the State asserts that Dr. Blake's "opinion was based entirely upon an erroneous interpretation of an abbreviation contained in the report [of FBI Agent Bigbee, who had done the prosecution's blood testing]." Resp. Br. at 32 n.22. This claim is based in turn upon Agent Bigbee's comment that Bigbee did not have "the foggiest idea" how Dr. Blake came up with the notion that the initials "INC" in Bigbee's reports stood for "incomplete." The State fails to inform this Court that (1) Bigbee himself testified at Mr. House's trial that the initials "INC" stood for an "incomplete" result, and thereafter used the term "incomplete" as interchangeable with the term "inconclusive," R4, Vol. VI, p. 906; and (2) when Dr. Blake was asked about his use of the term "incomplete," Dr. Blake stated that he meant the same thing. R275, Vol. II, p. 119. The State also points to Agent Bigbee's testimony that he disagreed with Dr. Blake's

expert opinion, but ignores (1) Agent Bigbee's concession that Dr. Blake's conclusion was a reasonable explanation for the similarities in the degradation of the two blood specimens, R276, Vol. III, p. 170, and (2) the fact that Dr. Blake and Agent Bigbee were in total agreement regarding the basic scientific principles regarding blood degradation upon which Dr. Blake relied.

Unable to discredit Dr. Blake's opinion with scientific evidence, the State turns to blood-spatter expert Paulette Sutton and argues that the transfer bloodstains on the jeans are inconsistent with direct spillage and consistent with a bloody object being wiped across Mr. House's jeans while they were being worn. Here the State neglects to mention (1) that Ms. Sutton conceded she could not determine the nature of the bloody object or who wiped the object, R276, Vol. III, p. 217, and (2) that the basis for Ms. Sutton's conclusion that the mixture of blood and mud on Mr. House's jeans is inconsistent with a transfer occurring in the evidence container was *Ms. Sutton's opinion that the transfer would have occurred when the mud was wet.* The latter omission is particularly misleading because the record shows that Mr. House's blue jeans had moist mud on them when they were seized by law enforcement, JA 274, and that there was no mud at the crime scene. JA 304, 308, 310. The Warden also fails to mention that although Ms. Sutton found bloodstains on the inside of the cuff area of Mr. House's blue jeans, she was unable to detect any blood on the tennis shoes he was wearing the night of the crime – shoes that did not come into the possession of law enforcement until *after* the autopsy samples and blue jeans had been transported to the FBI. JA 291-92, 296, 305.

The State next tells this Court that a reasonable juror would reject Dr. Blake's expert finding of autopsy-blood spillage because TBI Agent Charles Scott testified that when Scott initially seized Mr. House's jeans he saw stains which he thought "might" have been blood on them. In this submission, the State disregards the ample evidence that the stains on Mr. House's blue jeans that actually were Ms. Muncey's blood were very small and barely discernable, if discernible at all, to the naked eye. Finally, the

State simply ignores the fact that Dr. Blake's opinion regarding the source of the bloodstains is the only opinion which explains *the incontrovertible fact that the entire contents of one of the tubes of autopsy blood remains completely unaccounted for*. That the State can make an argument so full of misleading half-truths suggests how very unlikely it is that any reasonable juror hearing what remains of the prosecution's case at trial could fail to have a reasonable doubt of Mr. House's guilt.

### 3. The State gains no fair support from the district court's findings of fact.

The State asserts that Mr. House's showing of "'reliable, credible evidence of innocence'" is defeated by "valid credibility determinations entrusted to the district court as trier of fact at the federal evidentiary hearing." Resp. Br. at 16. But the district court's actual "credibility determinations" are few and immaterial;[11] and its only factual finding of consequence to which the State can point is: "the court concludes that the spillage [of blood from the test tubes packaged with Mr. House's jeans] occurred after the FBI crime laboratory received and tested the evidence." (JA 348; *see* Resp. Br. 33, 39.) This finding has two palpable flaws. Legally, it does not speak to the relevant *Schlup* gateway inquiry whether a reasonable juror, hearing that the State's crucial bloodstain evidence had been produced

[11] The district court divided its memorandum opinion into distinct sections containing findings of fact and conclusions of law. In its findings of fact, it summarized, largely without comment, portions of the Tennessee Supreme Court's opinion and portions of the evidence presented at the evidentiary hearing. Throughout, the court made only three credibility findings. It noted that Laura Tharp, the victim's daughter, was a credible witness and that she had testified consistently with her testimony at trial. JA 323. It found from Mr. House's demeanor that he was not a credible witness. JA 329. And it found that the fact that Mr. Muncey had engaged in sexual intercourse with his wife on the morning of her death indicated at least a "modicum of compatibility." JA 325. These findings do not reinvest with any confidence the State's failed case for Mr. House's guilt.

by a process in which some of the victim's missing, degraded autopsy blood, not fresh blood, stained the suspect's jeans – *and* hearing Tennessee's Assistant Chief Medical Examiner testify that the blood on the jeans was degraded autopsy blood – would entertain a reasonable doubt of the prosecution's proof of identity. (See Judge Merritt's trenchant analysis at JA 446-55.) And, factually, this finding by the district court is clearly erroneous.

The district court stated only that the "evidence introduced during the evidentiary hearing" supported its conclusion. JA 348. Certainly, photographic evidence and blood stains on the outside of the Styrofoam box containing the autopsy samples show that a small amount of blood leaked from *one* of the autopsy sample tubes onto the surrounding packing material and the Styrofoam box after the FBI had received and tested Mr. House's blue jeans. But the photographic evidence also shows that a *second* autopsy sample tube was *completely empty* when it arrived at the laboratory of a Tennessee serologist, and that none of the blood from that sample had leaked inside of the Styrofoam container. JA 307. TBI Agent Charles Scott stated in an affidavit that he had personally carried the autopsy samples from the FBI crime laboratory to the serologist and that he neither spilled blood nor observed any spillage of blood from the autopsy samples after FBI testing. R123, Attachment 1. Agent Bigbee, the person at the FBI crime laboratory who tested the autopsy samples, stated that he used no more than one-fourth of one autopsy sample during the course of testing. R276, Vol. III, pp. 161, 164. He also testified that there was no accidental spillage of blood from the autopsy samples while they were in the possession of the lab. JA 279. While there was conflicting evidence about what happened to the missing three-fourths tube of autopsy blood, the uncontradicted evidence in the record shows that the blood *from that* tube did not "leak" or "spill" after the FBI crime laboratory had received and tested Mr. House's blue jeans. Any conclusion or "finding" by the district court that it did is clearly, palpably erroneous.

### C. A proper inquiry under *Schlup* or *Herrera* requires consideration of the entirety of evidence indicating Hubert Muncey's guilt.

The State largely dismisses the substantial evidence pointing to Hubert Muncey, Jr., as the person who very probably killed Carolyn Muncey. It justifies this disregard of the evidence by asserting that the district court made one additional finding of fact, *i.e.*, that Kathy Parker and Penny Letner, the two friends of Mr. Muncey's who testified that he confessed the murder to them, were incredible. But the record shows no such finding. The district court did not find that either Ms. Letner or Ms. Parker was not a credible witness. It stated only that it was "not impressed with the allegations of individuals who wait over ten years to come forward with their evidence" especially when "there was no physical evidence in the Munceys' kitchen to corroborate his alleged confession that he killed her there." JA 348. This discussion of the women's testimony appears in the court's conclusions of law and reveals on its face that it is based upon faulty reasoning. But even if it were to be treated as a finding of fact, it is also clearly erroneous.

Ms. Parker and Ms. Letner did not "wait over ten years to come forward with their evidence." Ms. Parker testified without rebuttal or impeachment that she went to the police to report Mr. Muncey's confession the very next day after he made it, but that no one would listen to her. And the district court's suggestion that the women's testimony conflicts with Laura Tharp's statement that she saw no sign of a struggle in the kitchen when she got up to look for her mother is doubly unfounded. First, neither Ms. Letner nor Ms. Parker testified that Mr. Muncey said he killed his wife in the kitchen. Second, there is unrebutted and unimpeached evidence that Ms. Muncey was not killed until later in the evening, after Laura and her brother had returned to bed and gone back to sleep. R4, Vol. V, p. 671.

The record also flatly contradicts the district court's implication that Hubert Muncey's confession, as heard by

Ms. Letner and Ms. Parker, is uncorroborated. The record reveals: (1) the trial testimony of the medical examiner that Ms. Muncey died from a blow to the head, resulting in her very nearly immediate unconsciousness – which comports with Mr. Muncey's admission of inflicting a blow to his wife's head that resulted in her immediate unconsciousness, R4, Vol. VII, pp. 993, 1014; JA 232-33; (2) the trial testimony of several witnesses that Ms. Muncey's body was found near the Muncey home partially hidden under branches and with injuries consistent with being dragged through the woods, R4, Vol. V, p. 765, Vol. VII, pp. 1013-14 – which comports with Mr. Muncey's admission that, upon finding he had killed his wife, he hid her body to avoid going to jail, JA 233; (3) Mr. Muncey's denial that had ever abused his wife, R276, p. 44 – despite the testimony of no less than four witnesses, including Constable Wallace, that they had either seen Ms. Muncey's face bearing the marks of prior assaults or knew of Mr. Muncey's reputation in the community as a spousal abuser, R4, Vol. VII, p. 1087; R274, pp. 13, 15-16, 39; (4) Mr. Muncey's assault upon his wife earlier on the night she was killed, JA 225-30 – together with his subsequent denial of having even seen her at that time, R276, pp. 40-41; and, (5) Mr. Muncey's claim that he did not leave the dance until it ended around one o'clock in the morning, *id*, – despite Constable Wallace's testimony that Mr. Muncey left the dance earlier in the evening and did not return. R276, p. 56.

Ms. Parker and Ms. Letner would be highly credible to any reasonable juror, and the district court's only stated reasons for dismissing their testimony are neither reasonable nor prognosticative of a juror's probable reaction to it. Both women are long-time friends of Mr. Muncey's and neither has any connection to Mr. House or any reason to lie to help Mr. House. Their testimony is internally consistent, it is corroborated in key respects by the physical evidence, and, when viewed in the light of the entire record, it accords well with the testimony of several other witnesses (Mary Atkins, Ricky Green, Constable Wallace, and Hazel Miller) and is more consistent with the testimony of Laura Tharp Muncey than is the prosecution's

theory of the case. Both the district court and the Sixth Circuit majority erred in failing to give appropriate weight to all of the evidence of Hubert Muncey's identity as the actual killer of his wife, which complemented Mr. House's demonstration of his own innocence. Together, the two kinds of evidence more than meet the *Schlup* gateway standard of undermining confidence in the trial verdict to such an extent that it is probable no reasonable juror would vote to convict Mr. House on the prosecution's wholly disjointed, partly exculpatory, and fundamentally equivocal remaining evidence.

## III. Mr. House is Also Entitled to Relief Under *Herrera*.

The State argues that Mr. House's claim of a right to be spared execution if he has proved his innocence by newly discovered evidence is not before the Court.[12] It is.

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[12] It also argues (1) that "a plain reading of *Herrera* makes it clear" that a death-sentenced inmate has no federal constitutional right to avoid execution by a mere showing of innocence (Resp. Br. at 42); (2) that if such a right exists, the standard for claiming it should be proof of innocence beyond a reasonable doubt, (Resp. Br. at 46-49); and (3) that Mr. House's evidence of innocence fails to meet even the less exacting standard proposed by Justice White's concurring opinion in *Herrera*. (Resp. Br. at 49). We have addressed arguments (2) and (3) at Pet. Br. at 46-49 and see no need to add here anything more than the citations which confirm that a majority of the Justices in *Herrera* did not endorse the view that the State's argument number (1) plainly reads into that decision. *See* 506 U.S. at 427 ("Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim.") (Justices O'Connor and Kennedy, concurring): *id.* at 429 ("In voting to affirm, I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.") (Justice White, concurring); *id.* at 431 ("We are really being asked to decide whether the Constitution forbids the execution of a person who has been validly

(Continued on following page)

Mr. House pleaded the claim in his habeas corpus petition, and the court of appeals granted a COA on all claims. In the court of appeals, although Mr. House did not make a separate submission of his case for innocence under *Herrera*, both parties extensively briefed the factual question whether and to what extent Mr. House's new evidence had destroyed the prosecution's case against him and shown him to be a victim of mistaken identity – *i.e.*, actually innocent in the ordinary sense of that phrase. The only difference between "actual innocence" for *Schlup* purposes and "actual innocence" for *Herrera* purposes is the *quantum* of proof of innocence required; and the principal dissent in the court of appeals found Mr. House innocent enough to satisfy *Herrera*.

28 U.S.C. § 2106 informs both this Court and the court of appeals that when the judgment of a lower court is "lawfully brought before it for review," it may "direct the entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." Six dissenting judges in the court of appeals, after considering Mr. House's argument that he was "actually innocent" for *Schlup* purposes, concluded that his proof of innocence was so overwhelming as to constitute "actual innocence" for *Herrera* purposes as well. They therefore voted to give him the relief appropriate under *Herrera*. A majority of the court of appeals should have done the same under § 2106 if it reached the same conclusion; and this Court should do the same if it, too, finds the *Herrera* standard satisfied.[13] The propriety of

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convicted and sentenced but who, nevertheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, . . . , I do not see how the answer can be anything but 'yes.'") (Justices Blackmun, Stevens and Souter, dissenting).

[13] The State suggests that state judicial remedies may still be available to Mr. House. (Resp. Br. at 45 & n.35.) The suggestion is disingenuous. Mr. House has fruitlessly sought to reopen his former state habeas petition so that the habeas court could, *inter alia*, hear his evidence of innocence. Although that motion was filed three years ago, the State has never filed an answer and the court has done nothing. This is the

(Continued on following page)

such a disposition, in the light of § 2106 and the inherent relationship between the *Schlup* and *Herrera* issues, is established *a fortiori* by this Court's recent exercise of its discretion to consider an argument raised and briefed here, although not raised in a federal court of appeals in exactly the same terms, in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001).

## CONCLUSION

The decision of the court of appeals denying Mr. House relief for innocence should be reversed.

Respectfully submitted,

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proceeding that the State describes in its footnote 35 without mentioning the age and posture of the case. The State also argues that Mr. House must pursue executive clemency proceedings before raising a *Herrera* claim. (Resp. Br. at 44-45.) It fails to mention that under Tennessee law clemency is to be considered only after the conclusion of state and federal postconviction proceedings. *See Coe v. State*, 17 S.W.3d 249, 250 n.1 (Tenn. 2000).

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No. 04-8990

IN THE

# Supreme Court of the United States

PAUL GREGORY HOUSE,
*Petitioner,*

*v.*

RICKY BELL, WARDEN,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

In response to recent exonerations of numerous individuals who were "actually innocent" of the serious crimes of which they had been convicted, the American Bar Association has engaged in substantial study of issues relating to actual innocence, and has adopted a number of policies that address now-recognized weaknesses in the criminal justice system that have led to erroneous convictions. The ABA therefore files this *amicus* brief to address the following question:

> What factors should this Court consider in formulating and applying standards for "actual innocence" claims under either *Herrera* v. *Collins*, 506 U.S. 390 (1993), or *Schlup* v. *Delo*, 513 U.S. 298 (1995), in light of now-acknowledged flaws in the criminal justice system that can cause erroneous convictions—flaws not well-recognized when *Schlup* and *Herrera* were decided?

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## BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE ABA AS AMICUS CURIAE[1]

The American Bar Association is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States. It has long been dedicated to promoting a fair and balanced system of justice. Its mission is to serve the public and the profession by promoting justice, professional excellence, and respect for the law. Among the ABA's Goals are "[t]o promote improvements in the American system of jus-

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

tice" and "[t]o provide ongoing leadership in improving the law to serve the changing needs of society."[2]

The ABA's 408,000 members reside in all 50 States and other jurisdictions. ABA members include prosecutors, public defenders, private attorneys, legislators, law professors, law-enforcement and corrections personnel, law students, and non-lawyer "associates" in related fields. The ABA devotes substantial resources to the development of policies that speak to current legal issues. It approves such policies only after significant study, discussion, and consideration of comments from all segments of its membership.[3]

Petitioner, who is under sentence of death in Tennessee, asks the Court to identify and clarify the standards suggested in *Schlup* v. *Delo*, 513 U.S. 298 (1995), and *Herrera* v. *Collins*, 506 U.S. 390 (1993), for evaluating claims of "actual innocence" in federal habeas corpus proceedings. The ABA takes no position regarding the desirability of capital punishment. However, in light of the finality and severity of the death penalty, the ABA has long been concerned about the fair and balanced administration of justice in capital cases.

In 1990 after much study, the ABA adopted a set of policies related to the litigation of federal death penalty habeas corpus actions.[4] As explained below, portions of these Capital Habeas Corpus Litigation policies are relevant to the Court's resolution of the questions presented by Petitioner.

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[2] *ABA Policy and Procedures Handbook, 2004-2005* (Goals I & III), *available at* http://www.abanet.org/about/goals.html.

[3] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[4] These 1990 Capital Habeas Corpus Litigation policies, as well as the texts of all other ABA policies referenced in this brief, are reproduced in the accompanying appendix (App. 1a-14a).

In addition, the ABA has recently engaged in substantial study of, and policy-making regarding, claims of actual innocence by defendants in non-capital as well as capital cases. This effort was begun in the late 1990s as the seriousness and legitimacy of some "actual innocence" claims, and the flaws in the criminal justice system that can engender them, began to gain public recognition and acceptance.[5] As a 2005 ABA report noted, "recent exonerations of convicted defendants condemned to death have demonstrated the fallibility of a process susceptible to human error." ABA Report, *Systemic Remedies* 2 (Aug. 2005).[6]

Thus in the wake of "emerging instances of convicted persons who are exonerated by DNA and other biological evidence," ABA Report, *Criminal Justice*, No. 115, at 2 (July 2000), the ABA has adopted "Principles Concerning Biological Evidence" (App. 8a) that bear on this case in light of Petitioner's presentation of (1) DNA evidence that contradicts a portion of the prosecution's claims at trial and (2) evidence of mishandling of blood-sample evidence that was important to the prosecution's case.[7]

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[5] Similarly, acknowledging the changed legal and factual landscape of innocence claims, last year Congress enacted the Justice For All Act, Pub. L. No. 108-405 (2004), which encompassed the Innocence Protection Act, 18 U.S.C. § 3600 *et seq.* *See also United States* v. *Sampson*, 275 F. Supp. 2d 49, 56 (D. Mass. 2003) ("[I]n the past decade, substantial evidence has emerged to demonstrate that innocent individuals are sentenced to death, and undoubtedly executed, much more than previously understood."); *Harvey* v. *Horan*, 285 F.3d 298, 305-306 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing *en banc*) ("[T]hese scientific advances must be recognized for the singularly significant developments that they are. . . .").

[6] All of the ABA's Innocence Resolutions and their accompanying Reports are available at http://www.abanet.org/crimjust/news/home.html except for the August 2005 Report, by clicking on "Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process." The texts of the Resolutions are also reproduced in the Appendix to this brief. App. 1a-8a.

[7] The Biological Evidence Principles can also be found at http://www.abanet.org/crimjust/policy/cjpol.html#am00115.

Finally, over the past three years, the ABA has devoted significant effort to the study, formulation, and adoption of policies aimed directly at the now-recognized shortcomings of the criminal justice system in the context of "actual innocence" exonerations. To date, the ABA has adopted nine separate "Innocence Resolutions," addressing various issues now recognized as potential sources of erroneous convictions. App. 1a–8a.[8]

The ABA's interest here is to advise the Court of its efforts in this area, particularly because a number of its policies are relevant to issues or factors presented in Petitioner's case. The ABA's policy responses to shortcomings in various areas of the criminal justice system—shortcomings only recently recognized, but now well-acknowledged, sometimes lead to erroneous conviction of the innocent—are relevant to this Court's effort to elucidate standards for federal habeas petitioners who claim "actual innocence" based on such shortcomings. The same short-

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[8] In addition, at least two of the ABA's general Standards for Criminal Justice also bear consideration here. *See* nn.15, 25 *infra*. *See generally* ABA, *Standards for Criminal Justice* (2d ed. 1980, Supp. 1986) ("Standards"). As explained in the Introduction to the Prosecution Function and Defense Function Standards, the Standards are

> the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal Justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.

In light of this balanced and careful approach, this Court "long ha[s] referred to these ABA Standards as 'guides to determin[e] what is reasonable.'" *Rompilla* v. *Beard*, 125 S. Ct. 2456, 2467 (2005) (brackets and citations omitted).

The ABA's 1997 Death Penalty Moratorium policy is also relevant, as it recommends adherence to, *inter alia*, the 1990 Capital Habeas Litigation policies. App. 8a-9a.

comings that can lead to erroneous convictions are also likely to frustrate a convicted defendant's efforts to conclusively prove his "actual innocence" many years later. Thus, standards for federal habeas review that this Court develops and applies to innocence claims must be robust enough to ensure fair examination of precisely the types of constitutional shortcomings that may have compromised the Petitioner's ability to demonstrate innocence below, as well as at trial.

The ABA therefore respectfully submits this brief to advise the Court of its nine Innocence Resolutions, its Biological Evidence Principles, and its Capital Habeas Corpus Litigation policies. These materials support standards for "actual innocence" habeas corpus cases that are sufficiently robust to accommodate the various evidentiary and systemic shortcomings revealed by "actual innocence" cases—systemic shortcomings that were simply not well-appreciated at the time *Herrera* and *Schlup* were decided.

## SUMMARY OF ARGUMENT

In the decade since this Court decided *Herrera* v. *Collins*, 506 U.S. 390 (1993), and *Schlup* v. *Delo*, 513 U.S. 298 (1995), the American Bar Association has undertaken substantial study of the issues relating to "actual innocence" claims. The ABA's work has confirmed now-well-acknowledged existence of serious shortcomings in the administration of the criminal justice system.

In an effort to remedy these shortcomings and to addresses the rapidly evolving landscape of DNA and biological evidence, the ABA adopted a series of policy responses and recommendations. Specifically, the ABA adopted:

1. "Principles Concerning Biological Evidence" (2000), which recommended (a) that such evidence be made available to defendants and convicted persons upon request and (b) that they "may seek appropriate relief notwithstanding any other provision of law" (App. 8a); and

2. Nine separate "Innocence Resolutions" (2004-2005) that make specific recommendations for addressing the sources of erroneous convictions, including, *inter alia*, false

confessions and mishandling of forensic evidence, in order to "reduce the risk of convicting the innocent while increasing the likelihood of convicting the guilty." *See, e.g.*, App. 1a.

These recommendations, along with the ABA's Capital Habeas Corpus Litigation Policies, which address specific circumstances that justify overlooking procedural bars to raising innocence claims, are important guideposts in the development of standards for adjudicating claims under *Schlup* and *Herrera*. They support adoption of standards that are sufficiently robust to accommodate shortcomings of the criminal justice system that sometime produce erroneous convictions of persons who are actually innocent.

## ARGUMENT

### ABA Policies Support The Formulation And Application Of Robust Actual Innocence Standards In Capital Habeas Corpus Proceedings

As the United States Senate reported in 2002, "[r]ecent exonerations of inmates awaiting capital punishment or serving lengthy prison sentences have cast doubt on the reliability of the criminal justice system." S. Rep. No. 107-315, at 7 (2002) (accompanying the Innocence Protection Act, subsequently enacted as part of the Justice for All Act of 2004, Pub. L. No. 108-405 (2004), and codified at 18 U.S.C. § 3600 *et seq.*) ("Senate Report"). These exonerations have demonstrated, as Justice O'Connor has observed, that "the system may well be allowing some innocent defendants to be executed." 2001 Address to Minnesota Women Lawyers Association, *quoted in* Senate Report 7. Because the punishment of those who are actually innocent impairs the administration of justice and corrodes public confidence in the criminal justice system, the ABA has devoted substantial resources to studying issues related to actual innocence (in both capital and non-capital contexts) since the late 1990s.[9]

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[9] The 2002 Senate Report on the Innocence Protection Act specifically referenced ABA standards in addressing these issues. Senate Report 25.